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No. 93-1405

In The

Supreme Court of the United States

October Term, 1993

NICHOLAS PARLAVECCHIO and ANTONINO PARLAVECCHIO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioners' constitutional rights to due process and to a fair trial were violated by the application of an erroneous legal standard, at variance with the standard applied outside the Third Circuit, for determining the existence of a conspiracy or an unlawful attempt?

2. Whether the constitutional rights of petitioners to confrontation, to due process and to a fair trial were violated by the Third Circuit's affirmance of the District Court's admission of hearsay tape recordings into evidence and of the District Court's failure to instruct the jury that it could not consider certain statements of a government informant as atatements of a co-conspirator?

3. Whether, by affirming a sentence based upon an erroneous and unsupported finding that a 30 kilogram cocaine conspiracy existed, the Third Circuit violated petitioners' due process rights and their rights under the Sentencing Guidelines?

4. Whether the judgment of conviction must be vacated because the Third Circuit erroneously failed to recognize the existence of the doctrine of sentencing entrapment and its applicability to this case, where the drug amounts discussed were initiated by the government solely for the purpose of exposing petitioners to a grossly elevated sentence under the Sentencing Guidelines?

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Petitioners Nicholas Parlavecchio and Antonino Parlavecchio pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit denying Petitioners' applications for en banc consideration and for reconsideration and affirming the judgment of conviction entered by the trial court.

OPINIONS BELOW

The Court of Appeals affirmed the judgments of conviction by judgment orders (3a, 6a)[1] and it denied petitioners' applications for en banc consideration and for reconsideration by judgment order. (1a). No opinions were issued by the Court of Appeals or by the District Court.

STATEMENT OF JURISDICTION

Petitioners were originally defendants in a criminal action brought in the United States District Court for the District of New Jersey. The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. Judgments of conviction were entered against petitioners on April 21, 1992. (9a, 22a). Timely appeals were filed with the United States Court of Appeals for the Third Circuit, which had appellate jurisdiction to review the judgments of the District Court pursuant to 28 U.S.C. § 1291. Judgment orders affirming the judgments of conviction were entered by the Third Circuit on October 18, 1993, after the court had, at its request, heard oral argument on petitioners' appeals. (3a, 6a). Applications for reconsideration and for en banc review were subsequently filed with the Third Circuit, which entered judgment orders denying the applications on December 7, 1993. (1a). Petitioners seek a writ of

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1. The notation "__a" refers to the appendix annexed to this Petition. The notation "Da" refers to the appendix filed by defendants with the United States Court of Appeals for the Third Circuit and the notion "DSA" refers to the supplemental appendix of defendants filed with the same court.

certiorari to review the judgments of the United States Court of Appeals for the Third Circuit. This Court has jurisdiction to review the judgments below pursuant to 28 U.S.C. § 1254(1).

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution are pertinent: the Fifth and Sixth Amendments. In addition, selected provisions of the United States Sentencing Guidelines are implicated. The provisions of law applicable to this Petition are set forth in the annexed appendix.

STATEMENT OF THE CASE

On January 17, 1991, a 26-count indictment was filed against defendants Antonino Parlavecchio, Nicholas Parlavecchio, Daniel Dellisanti and James Zirpoli. On November 6, 1991, petitioners were arraigned on a superseding indictment before the Honorable Garrett E. Brown, Jr., of the United States District Court for the District of New Jersey. The superseding indictment charged petitioner Nicholas Parlavecchio and his son, Antonino Parlavecchio, with, among other things, a RICO conspiracy [Counts 1 and 2], a conspiracy to distribute and to possess with the intent to distribute cocaine [Count 4], an attempt to distribute with the intent to distribute one kilogram of cocaine [Count 5], the use of a telephone to facilitate a cocaine conspiracy [Counts 6 to 10], and the possession with the intent to distribute approximately 2 grams of cocaine [Count 11], a conspiracy to traffic in counterfeit credit cards [Count 12]. Petitioner Nicholas Parlavecchio was also charged individually with conspiring to distribute and to possess with the intent to distribute heroin. [Count 3].

The trial began on November 20, 1991, and it ended on December 18, 1991. Petitioner Nicholas Parlavecchio was acquitted of the heroin distribution offense. He and Antonino

Parlavecchio were both acquitted of certain allegations pertaining to wire fraud and the transportation of counterfeit money orders. They were both convicted on the remaining charges against them. Or December 26, 1991, timely motions for a new trial and for the entry of judgments of acquittal were filed on behalf of both petitioners. [Da-24(4)], and subsequently the motions were denied. [Da-24(7)]. On April 15, 1992, petitioners were sentenced. Petitioner Nicholas Parlavecchio was sentenced to a prison term of *210 months*, and petitioner Antonino Parlavecchio was sentenced to a term of *168 months*.

The cocaine conspiracy that resulted in petitioners' convictions, as well as their extremely lengthy sentences, was alleged to have begun on July 1, 1989. For purposes of this Petition, this is a crucial date. To prove the conspiracy, the government introduced at trial numerous tape recordings, many of which *predated* the cocaine conspiracy. Petitioner Nicholas Parlavecchio was a participant in some of the conversations surreptitiously recorded prior to the conspiracy. Other "pre-conspiracy" tapes did not involve Mr. Parlavecchio at all, but were instead recordings of conversations between a man named Hamilton Campos and others, who were talking *about* Nicholas Parlavecchio in a drug-related context. Although Campos was not indicted, he was alleged to have conspired with Nicholas Parlavecchio in the heroin conspiracy that only petitioner Nicholas Parlavecchio had been charged with and had been acquitted of.

The "pre-cocaine conspiracy" tape recordings were extensively relied upon by the government in its summations to the jury in order to prove that petitioners were involved in a cocaine conspiracy. The prosecutor told the jury that: on May 2, 1989, Campos and his friend, Erastro, were putting together a plan to export Brazilian cocaine to Italy. [Da1315]; that in a May 1989 conversation Campos is heard telling Erastro that "Nick" was not in a good mood because Campos owed him interest on a loan [Da1316]; and that in another May 1989 conversation a man

named Ricardo is telling Campos "I have eight ready to deliver to you" and he asks him to tell "Nick" that it's the "best stuff he's ever seen in his life". [Da1317 to A1318]. The prosecutor argued to the jury "And you know what the eight are, it was eight kilograms of cocaine". [Da1318].

In arguing to the jury about the tapes, the prosecutor emphasized that the pre-conspiracy hearsay tapes were being offered for their truth. Referring explicitly to the May 1989 conversations, which predated the conspiracy charged in the indictment, the prosecutor argued:

> . . . *[B]ut tapes don't lie*, ladies and gentlemen, and you heard what they were saying on the tapes. You heard that they were ready, willing and able to do this deal.
>
> * * *
>
> Maybe there could be idle talk three times, five times, six times, seven times, eight times, ten times. Just in July and August there were 48 tapes. That's a lot of idle talk. And that's not to mention all the stuff before the government even got involved. *It was also explained as mere discussion and idle talk in May of 1989. There's an awful lot of idle talk going on here. If these people don't intend to do exactly—exactly what they tell you they intend to do over and over and over again, they sure wasted an awful lot of time talking about it, and they sure do engage in an awful lot of pointless activity in furtherance of something if they don't intend to do it.*

[Da1555-1556] (emphasis supplied).

In a brief filed with the Third Circuit, the government acknowledged that the "pre-cocaine conspiracy" tapes heard by the jury also involved discussions between Campos and a man named Valente to ship Brazilian cocaine every week in amounts ranging from ten to fifteen kilograms at prices centering around $40,000 per kilogram, [Government Brief at 52], that "code words" were used on the tapes, *id.*, and that one conversation made reference to Antonino Parlavecchio. *Id.* at 53. The last conversation introduced by the government on its direct case against petitioners was made on May 17, 1989.

On July 1, 1989, the day that the cocaine conspiracy was alleged to have begun, Hamilton Campos agreed to cooperate with the government in its investigation of drug transactions and he thereby became a government agent. After July 1, 1989, Campos began surreptitiously recording conversations he had with petitioners. Campos was told by a DEA agent named Guslavage that he was to discuss certain explicit quantities of drugs with petitioners in order to induce them to enter into an agreement to make a purchase from him. Three separate plans had to be developed for Campos, each of which failed. On July 27, 1989, after the government's three entrapment plans had failed,, petitioner Nicholas Parlavecchio had his secretary tell Campos that it was "over".

As the following chart demonstrates, although there was a lot of "puffing" by the recorded participants about engaging in a deal, *no agreement was ever reached.* Moreover, it was *Campos* who initiated discussions about large quantities and who sought to continue discussions even though he was told that any potential deal was over:

Date	Campos	Nick
7-1-89	"I just got about 60 cases of it."	

Date	Campos	Nick
7-7-89		"Did you hear what he said he had? Sixty-twelve. (To Nino)
7-7-89		"At the 12 he would let it go and on his and, him and I will be in 5 apiece" (To Nino).
		Conversation contains other references to 12, to "nickel" and to 7.
7-11-89	"Uh, 35, they, they got rid of already, and they got 20, you know, if you want to.	
	"They tell me they got 25 left."	
7-20-89		"Can it be like in 2's and 3's, if anything?" (To Campos).
7-20-89		"We'll take uh, 10" (To Campos).
		"Maybe a 2 or 3 here that I could possibly."
		"Maybe 5, I don't know".

Date	Campos	Nick
		"I'm interested in this one guy with that little thing." (To Campos).
7-27-89		"Your friend was here and he was talking very small. He wasn't talking about anything a he was talking like one" (To Giovinazzo).
7-27-89		"That is really the potential for 30." (To Campos).
	"3 will be done right away."	"What three? Thirty." (To Campos)
		"One, two, three, four, five, you know" (To Campos).
7-28-89		"Ah he told me to tell you that um, it's, it's, it's over." (Lisa to Campos).
8-1-89		"2's or 3's" (To Campos)
		"I can't tell people what to do."
8-18-89	"I'm holding on to these 30 things for you."	

The sole purpose for the government having introduced the tape recordings involving Campos and having had him testify was to have the jury draw an inference that petitioners' conversations with him were probative of a drug conspiracy among petitioners themselves. In summation, the government attorney argued that the tapes, which "don't lie", are *direct evidence* of a conspiratorial agreement. [Da1555-56, A1565].

Prior to trial, defense counsel had objected to the introduction of the tapes, claiming that they were not admissible under any rule of evidence. [Da62, A66]. The court admitted the tapes under Rule 404(b), however, as "explanatory of the offense charged" and as being probative of such things as motive and intent.

Later in the trial, after hearing the testimony of Campos, and recognizing the purpose for which his testimony had been offered, the court stated that the jury would have to be instructed that Campos could not be a conspirator of petitioners once he began cooperating on July 1, 1989:

> . . . Mr. Campos was acting on behalf of the government and while he may appear to agree, as a legal matter, one cannot conspire with a government agent who is seeking to arrest you, anymore than one can conspire with himself. A government agent is not a conspirator. And if the only conspiracy were between the government agent and the defendant, that would not be a conspiracy.

[Da796(411)].

Although the court specifically recognized the need to instruct the jury that Campos could not be a conspirator once he began cooperating with the government, the crucial instruction was never given. The judge only instructed the jury generally that a

government agent could not be a coconspirator, *but he did not instruct the jury that, effective July 1, 1989, Campos was legally regarded as a government agent.* The court's lapse in failing to provide an instruction it acknowledged it needed to give, was not recognized by any of the parties at the time the jury was charged. The court also failed to charge the jury that, *to the extent that "pre-cocaine conspiracy" tape recordings were introduced, the matters contained on those tapes could not be considered for their truth.* The need for this instruction too had been overlooked by the parties.

Prior to sentencing, a presentence report ["PSI"] was prepared by the United States District Court Probation Office. In the report, the probation officer found that the amount of cocaine that was the reasonably foreseeable object of negotiations was between five and fifteen kilograms. [PSI Report at 16]. Petitioners filed lengthy objections to the report [DSA1 to 8].

Petitioners' sentencing arguments were rejected by the court on April 15, 1992, when petitioners were sentenced. The court also rejected the Probation Officer's finding that the alleged conspiracy involved between 5 to 15 kilograms of cocaine, and instead conclusorily found that the conspiracy involved 30 kilograms of the drug, thereby raising the offense level by two points above the level suggested by probation as being appropriate.

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL WERE VIOLATED BY THE APPLICATION OF AN ERRONEOUS LEGAL STANDARD, AT VARIANCE WITH THE STANDARD APPLIED OUTSIDE THE THIRD CIRCUIT, FOR DETERMINING THE EXISTENCE OF A CONSPIRACY OR AN UNLAWFUL ATTEMPT.

A. The Government Failed to Prove the Existence of a Conspiracy to Distribute Cocaine.

It is a fundamental principal of law that to convict a defendant of the crime of conspiracy, there must not only be evidence of an unlawful agreement, but the defendants must have shared a "unity of purpose" in working towards the goal of that unlawful agreement. *United States v. Wexler,* 838 F.2d 88, 90-91 (3rd Cir. 1988) *See also, United States v. Kates*, 508 F.2d 308, 310-11 (3rd Cir. 1975); *United States v. Nusraty,* 867 F.2d 759 (2nd Cir. 1989) In *United States v. Melchor-Lopez,* 627 F.2d 886 (9th Cir. 1980), the Ninth Circuit Court of Appeals recognized that for a drug conspiracy to exist, there must be agreement as to the price of the drugs, the quantity to be supplied and the time and place for delivery. It further recognized that all preconditions to the alleged conspiratorial agreement must be fulfilled for the agreement to ripen into a criminal conspiracy.

In *Melchor-Lopez,* because the place of delivery, an essential precondition of the conspiracy, had not been agreed upon, the court found that a conspiracy had not been demonstrated. Here, the government not only failed to prove an agreement as to time and place of delivery, but it failed to prove that *any agreement* at all existed, including any agreement as to the quantity of drugs to be purchased, the price for the drugs, or the ability to finance the

alleged transaction. Because the District Judge and the Third Circuit failed to apply the correct legal definition for conspiracy, Petitioners' rights to a fair trial and to due process were violated.

The government's theory at trial was that petitioners Nicholas and Antonino Parlavecchio conspired to act as brokers in a scheme to distribute cocaine. That conspiracy was alleged to have begun on or about July 1, 1989 and ended on or about August 18, 1989. Although the cocaine conspiracy was charged as a separate count of the indictment, the same acts alleged to constitute the cocaine conspiracy were set forth as predicate acts in the RICO counts of the indictment.

In order to prove its contention that petitioners acted as brokers in a cocaine conspiracy, the government introduced various tape recordings of conversations between Campos, who became an informant on July 1, 1989, Ricardo Pimenta, a man named Erastro, and Nicholas Parlavecchio. *All of these surreptitiously recorded conversations predated the existence of the alleged cocaine conspiracy.*

Viewed in the light most favorable to the government, *United States v. Pecora*, 798 F.2d 614, 618 (3rd Cir. 1986) the best that can be said for the government's case is that the government proved that negotiations, failing to culminate in any agreement, occurred. Although the conspiracy was alleged to have been between Nicholas Parlavecchio, Antonino Parlavecchio, Andrew Giovinnazo and Daniel Delissanti, there was no direct proof of such a conspiracy. *Instead, what the government sought to show through the testimony of Campos and of the surreptitious tape recordings made of him and others was that an agreement had been reached by petitioner Nicholas Parlavecchio with Campos to purchase a certain quantity of drugs from him. The government asked the jury to infer from that alleged agreement that the drugs being purchased by Nicholas Parlavecchio were to be supplied to Andrew Giovinazzo after first being tested by Daniel Delissanti.*

The government's reasoning was seriously flawed. The tapes conclusively demonstrate that *no agreement* had been reached on the *quantity* of drugs to be supplied, the *price* to be paid for the drugs, the *place* for the delivery of the drugs, or the *time* for such delivery, all essential elements of a conspiracy. All that can be heard on the tapes is "puffing" by Nicholas Parlavecchio. Not only did Parlavecchio "puff", but he made clear that, before any agreement could be reached, a condition had to be fulfilled: a sample kilo would have to be supplied so that its quality could be tested. That precondition was never met. Because there was no agreement between petitioners and Campos, the jury had no grounds for inferring that petitioners conspired among themselves to obtain drugs.

The testimony of Campos, as well as of agent Guslavage, confirms the absence of an agreement. Campos was questioned extensively on cross-examination about each one of his discussions with the Parlavecchios after he became an informant on July 1, 1989, and had begun his own surreptitious taping for the government. Campos admitted that he had *never* reached any agreement to supply drugs to any of the petitioners. Similarly, Guslavage acknowledged that three different plan had to be formulated because petitioners were refusing to enter into any deals with Campos. Under the last of the three plans, Campos advised Nicholas Parlavecchio that he would supply him with 3 kilograms of cocaine and, if the cocaine were not satisfactory, it would not have to be paid for. Even that plan, where *an offer of free cocaine was made*, failed; Nicholas Parlavecchio refused to agree to purchase anything from Campos. *In fact, Nicholas Parlavecchio, through his secretary, told Campos, on July 27, 1989, that it was "over" and, after that date, Parlavecchio never negotiated with any other potential source.*

As noted above, circumstances strongly analogous to those here were considered by the Ninth Circuit in *United States v. Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980). There, the court

reversed a conspiracy conviction because a precondition to the allegedly unlawful agreement, the particular place of delivery, had not been agreed upon, though the price and quantity had been agreed to. Finding that defendant had not entered into an agreement, because the place for delivery had not been specified by the parties, the Ninth Circuit reversed the conviction. In so doing, the court held that here can be no conviction for "guilt by association". The court also held that "mere association with members of a conspiracy, the existence of an opportunity to join a conspiracy, or simple knowledge, approval of, or acquiescence in the object or purpose of the conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator. *Id.* at 891. The court noted that the line between "conspiracy and an unexercised opportunity to join a conspiracy may be difficult to draw, but it must be drawn where the existence of an agreement is absent. *Id. See also, United States v. Bell,* 954 F.2d 232 (4th Cir. 1992) (conviction reversed where evidence of conspiracy deficient); *United States v. Jones,* 765 F.2d 996 (11th Cir. 1985) same); *United States v. Trowery,* 542 F.2d 623, 262 (3rd Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977). In affirming the judgments of conviction, the Third Circuit failed to follow the Ninth Circuit's correct statement of conspiracy law.

If the facts of *Melchor-Lopez* did not establish a conspiracy, then plainly, had the correct legal standard been applied by the Third Circuit, no conspiracy could have occurred here, where there was no agreement on price, quantity, place of delivery, or time for delivery.[2] Moreover, the record is barren of proof that, even if price, quantity, place of delivery and time of delivery had been

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2. In fact, on August 11, 1989, purportedly *after* the conspiracy had been completed, the government, in an affidavit submitted to the court for an extension of a wiretap that had been placed on the Petitioners' telephones, stated that "Infiltration of this organization through undercover agents has been attempted and has resulted only in *limited negotiations*. . . ." [Paragraph 22]. Thus, even the government had viewed the conduct being monitored as reflecting ongoing negotiations, and not as a completed conspiracy.

agreed upon, petitioners had the financial means to go forward with any transaction. The record reflects that a kilo of cocaine would cost anywhere from $12,000 per kilo to $40,000. Petitioners were sentenced based upon an alleged 30 kilogram conspiracy. There is no proof whatsoever that the funds required to finance a transaction of this magnitude were in any way available to petitioners. Because proof of crucial elements of conspiracy were lacking, the Third Circuit's affirmance of the District Court's failure to grant petitioners' motion for a judgment of acquittal or, alternatively, for a new trial, was erroneous.

B. The Government Failed to Prove the Existence of an Unlawful Attempt to Distribute Cocaine.

The District Court and Third Circuit not only applied an erroneous legal standard for determining the existence of a conspiracy, but it also failed to apply the correct standard for determining whether an unlawful attempt occurred. Under the law, in order for a person to be guilty of an attempt, he must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting. In addition, his conduct must constitute a "substantial step" toward commission of the crime. A substantial step is one which strongly corroborates the seriousness of the defendant's criminal intent. *United States v. Mandujano*, 499 F.2d 370, 376-77 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975). This "substantial step" requirement has been recognized and correctly applied in other Circuits. *See, e.g., United States v. Delvecchio*, 816 F.2d 859 (2nd Cir. 1987)*United States v. Joyce*, 693 F.2d 838 (8th Cir. 1982). Here, the elements of attempt were unproven: not only was the required proof of criminal attempt lacking, but no "substantial step" was taken by petitioners towards the commission of a crime.

It was only because the District Court and Third Circuit applied an incorrect legal standard for determining whether an attempt occurred that petitioners were convicted. The government's rationale in arguing that an attempt had occurred

was that defendant Delissanti had come to petitioners' car wash in order to pick up a one kilo sample of cocaine that was to be delivered by Campos. Campos came to the car wash with the kilo allegedly in the trunk of his car. Delissanti, however, had left the car wash before Campos arrived. The one kilo sample purportedly in Campos's car was thus not only delivered, but the trunk of Campos' car was never even opened, and the alleged cocaine was not viewed by any of the defendants. In fact, petitioner Nicholas Parlavecchio specifically told Campos that he did not want to see what he had and *he sent him away.* How, under any circumstances, such conduct could constitute an unlawful attempt is baffling. Plainly, however, the conduct which allegedly occurred did not meet the elements of an attempt offense.

Circumstances strongly analogous to these were present in *United States v. Joyce,* 693 F.2d 838 (8th Cir. 1982), where the court vacated an attempt conviction. In *Joyce,* the Eighth Circuit distinguished between acts of "mere preparation" and those constituting an attempt. Although the court acknowledged that the defendant had the opportunity and ability to purchase the cocaine at the agreed upon price, his refusal to produce the money, the court found, fell short of the "substantial step" necessary to constitute an attempt. The court also found unpersuasive the government's allegation that the defendant would have purchased the cocaine but for the agent's refusal to open the package. The court reasoned that even if the defendant was suspicious that he was dealing with an agent, his motivation in refusing to consummate the transaction is irrelevant to convert mere preparation into an attempt.

Similarly, here, no substantial step was taken towards completion of the crime alleged. In fact, petitioner Nicholas Parlavecchio not only did not wish to see what Campos was purportedly carrying in his car, but he sent him away. *See also, United States v. Delvecchio,* 816 F.2d 859, 862 (2nd Cir. 1987) (no substantial step taken—"evidence of a verbal agreement alone,

without more, is insufficient as a matter of law to support an attempt conviction."); *United States v. Monholland*, 607 F.2d 1311 (10th Cir. 1979)Finding attempt to kill judge not proven even though dynamite displayed and payment discussed). Because the government failed to prove the elements of the offense of attempt and because the courts below applied an incorrect standard, at variance with standards used in other circuits, in determining whether an attempt had been committed, petitioners' motions for a judgment of acquittal or, alternatively, for a new trial, should have been granted.

II.

THE CONSTITUTIONAL RIGHTS OF PETITIONERS TO CONFRONTATION, TO DUE PROCESS AND TO A FAIR TRIAL WERE VIOLATED BY THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S ADMISSION OF HEARSAY TAPE RECORDINGS INTO EVIDENCE AND OF THE DISTRICT COURT'S FAILURE TO INSTRUCT THE JURY THAT IT COULD NOT CONSIDER CERTAIN STATEMENTS OF A GOVERNMENT INFORMANT AS STATEMENTS OF A CO-CONSPIRATOR.

Although the cocaine conspiracy was alleged to have begun on July 1, 1989,[3] the day that Campos began recording his conversations with petitioners, the government, over the objection of petitioners, introduced into evidence tape recordings that were surreptitiously made in May 1989, and on other dates preceding July 1, 1989, when Campos himself was being surreptitiously taped. On the tapes, Campos is heard speaking with different

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3. In his summation, the prosecution contended that the cocaine conspiracy was formed on July 7, 1989 and that the attempt alleged in the indictment occurred on July 27, 1989. [A1328-19 to 1328-25; A1339].

people, including Ricardo Pimenta, a man named Erastros, and Nicholas Parlavecchio. *In some of the "pre-conspiracy" conversations, petitioner Nicholas Parlavecchio was being talked about even though he was not a party to the particular conversation.* The government repeatedly referred to the tapes in summation as involving negotiations for an unconsummated drug deal. The government contended that drugs were referred to on the tapes using coded language, such as calling drugs "brushless rollers", lingo used in the car wash business, a business that the Parlavecchios owned. [Da1318-1320]. The conversations purportedly evidenced a separate, uncharged, conspiracy. The government contended that the tapes were admissible under Rule 404(b) of the Federal Rules of Evidence, because they were "explanatory of the offenses charged" and proved such things as motive and intent. [Da60].

Defense counsel objected to the introduction of the tape recordings, noting that they predated the cocaine conspiracy charged, and therefore could not be admissible as co-conspirator statements in furtherance of a conspiracy under Rule 801(d)(2) of the Federal Rules of Evidence. Counsel also noted that some of the conversations not only predated the cocaine conspiracy alleged in the indictment, but they were also irrelevant because they had nothing to do with petitioners. Moreover, even if the conversations were somehow relevant to some issue in the case, their probative value was outweighed by the prejudice that their introduction would cause petitioners. Counsel vociferously argued that there was no evidentiary basis whatsoever for the admissibility of the tape recordings. [Da62, A66].

Notwithstanding counsel's objections to the tape recordings, the court admitted them into evidence. At trial, the government played the recordings for the jury. All of the recordings played were of conversations occurring prior to July 1, 1989. The conversations were referred to at length in the government's summation. The prosecuting attorney specifically told the jury to

consider "the later tapes which are from the May period", with respect to the heroine charge against petitioner Nicholas Parlavecchio, and he also asked to the jury to consider other statements heard on the tapes in connection with the government's case. [Da1555-56]. The prosecutor emphasized that the jury should give special weight to the tapes, because "tapes don't lie" and he stressed that the tapes evidenced a conspiratorial agreement. [Da1565]. Special mention was made by the prosecutor of various tapes in which others, prior to the starting date of the conspiracy,[4] purportedly referred to dealing with petitioner Nicholas Parlavecchio.

During trial, the judge, stating that he was anticipating the charge conference, noted that after July 1, 1989, after Campos became an informant, it would have been a legal impossibility for petitioners have entered into a conspiratorial agreement with him because Campos was not a conspirator, but a government agent. [Da796(411)]. The court stated:

> . . . Mr. Campos was acting on behalf of the government and while he may appear to agree, as a legal matter, one cannot conspire with a government agent who is seeking to arrest you, anymore than one can conspire with himself. A government agent is not a conspirator. And if

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4. For example, he referred to a May 2, 1989, conversation between Campos and his friend Erastro, in which the two were "putting together a plan to export Brazilian cocaine to Italy." [A1315]. He also referred to another conversation between Campos and Erastro, also in May 1989, where Campos states that "Nick" is not in a good mood because of interest owed to him on a loan made to Campos. [A1316]. Referring to a conversation in May 1989 between Campos and Ricardo, the prosecutor noted in summation that "Ricardo tells Campos to tell Nick it's the best stuff he's seen in his life" and Ricardo also says to Campos "I have eight ready to deliver to you." [A1317 to A1318]. "And you know what the eight are", the prosecutor argued to the jury, "it was eight kilos of cocaine." [A1318].

> the only conspiracy were between the government agent and the defendant, that would not be a conspiracy.

[Da796(411)].

Notwithstanding the court's acknowledgment that petitioners could not legally have entered into a conspiratorial agreement with a person who was acting as a government agent, and the court's further acknowledgment that the issue would have to be dealt with in the court's charge to the jury, the court only generally instructed the jury that a government agent could not be a co-conspirator. The court told the jury in summary fashion that a government agent could not be a conspirator because he could not possess the criminal intent necessary to enter into a conspiracy. [Da1645]. *The judge did not instruct the jury, however, that it was obligated to regard Campos as a government agent as of July 1, 1989.* Such clarification was crucial because some of the tape recordings of Campos' conversations *predated* the cocaine conspiracy alleged, and some occurred *during* the alleged conspiracy. Although petitioners maintain, for the reasons set forth below, that there was no evidentiary basis for the pre-conspiracy conversations being played for the jury, the statements made by Campos when he was acting as a government agent clearly could not be deemed co-conspirator statements, admissible for their truth. Because appropriate limiting and clarifying instructions were not given in the court's final charge, the jury may well have improperly considered Campos's post-June 30, 1989, statements for the truth, and may have misused the statements to find petitioners guilty of conspiring with each other, or, more dangerously and inappropriately, of conspiring with Campos, whose status as a government agent was never clearly defined by the court.

As noted above, the tapes that had been heard by the jury on the government's direct case were all of conversations occurring *prior to* July 1, 1989, the date that the cocaine conspiracy allegedly

began, and the date on which Campos became an informant. On these pre-conspiracy tape-recorded conversations, Campos, who does not know he is being taped, is engaged in discussion, at different times, with Erastro, Ricardo and Nicholas Parlavecchio. In various of these conversations, Ricardo and Erastro are heard discussing Nicholas Parlavecchio. The government sought to use these conversations at trial to inculpate petitioners.

While the evidentiary ground asserted for introduction of the tape recordings was Rule 404(b) of the Federal Rules of Evidence, which permits, under limited circumstances, evidence of other crimes, the conversations were, in fact, rank, inadmissible hearsay. The policy behind Rule 404 is that a defendant "should be confronted at trial only with that evidence of uncharged crimes which is relevant to his responsibility for the charged crime." *United States v. Pantone,* 609 F.2d 675, 683 (3rd Cir. 1979). By limiting the admissibility of evidence of prior bad acts, the rule prevents collateral matters from being given undue weight by the jury and ensures that the jury will not "prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *United States v. Perry,* 512 F.2d 805, 806 (6th Cir. 1975). Even if the evidence sought to be admitted under Rule 404 is probative of the charges against defendant, it must still be weighed against the prejudicial impact of the evidence. *United States v. McFadyen -Snider,* 552 F.2d 1178, 1183 (6th Cir. 1977). If the prejudice from the admission of the evidence outweighs its probative value, the evidence must be excluded. *Id.*

Assuming, *arguendo*, that it was proper for the government, through the testimony of Campos, to offer evidence of his alleged prior dealings with Nicholas Parlavecchio, it was completely improper to use extrinsic evidence, such as tape recordings which petitioners could not fairly confront, to corroborate Campos's testimony. In fact, Rule 608(b) of the Federal Rules of Evidence, specifically precludes the use of such extrinsic materials to support

a witness' credibility. Yet, here, the court, by permitting extrinsic hearsay evidence to be used to corroborate the prior bad acts testimony being offered by Campos, violated petitioners' rights to confrontation. It was impossible for petitioners to challenge statements made by Erastro or Ricardo about Nicholas Parlavecchio on the tape recordings, when these persons, who were not conspirators in the cocaine conspiracy that was the subject of the indictment, were never called as witnesses by the government.

It is a fundamental principle, under the Sixth Amendment to the United States Constitution, that every accused in a criminal proceeding has the right to be confronted with the witnesses against him. *Davis v. Alaska,* 415 U.S. 308, 315 (1974). The absence of proper confrontation "calls into question the ultimate integrity of the fact-finding process." *Ohio v. Roberts,* 448 U.S. 56, 64 (1980). The hearsay that the court permitted to be admitted into evidence over the strong objection of petitioners was plainly violative of petitioners' fundamental constitutional rights to confrontation, to due process and to a fair trial. Furthermore, the prejudicial impact of the evidence far outweighed any probative value it had. Even assuming, arguendo, that the extrinsic evidence and Campos's testimony regarding alleged "prior bad acts" were admissible for a limited purpose, the trial judge had an obligation to instruct the jury that it was not to consider the evidence for the truth of what was said, but rather only for the limited purpose for which the evidence had been admitted. Here, no such instruction had been given, thereby compounding the highly damaging error the court made in the first instance by allowing the evidence to be introduced. Furthermore, even in its final charge to the jury, the court never instructed it on the limited uses it could make of the evidence presented. In fact, the court, though it suggested it would do so, did not even instruct the jury, in its final charge, that Campos was to be deemed a government agent effective July 1, 1989. The failure to give that fundamental instruction not only permitted the jury to consider hearsay evidence for its truth, but also created the

possibility that the jury would find, based upon Campos's participation in the taped discussions, that a cocaine conspiracy existed between Campos and petitioners, rather than between petitioners themselves. *See United States v. Xavier,* 2 F.3d 1281 (3rd Cir. 1993) (crucial defect in jury instructions prejudicing a defendant's due process rights at trial requires reversal). Because the Third Circuit erroneously affirmed various improper rulings of the trial court, including its decision to admit hearsay evidence that could not be confronted by petitioners, its failure to properly instruct the jury on the limited uses that could be made of such evidence and its failure to instruct the jury on the legal implications of Campos's informant status, this court should grant petitioners' Petition for Certiorari.

III.

BY AFFIRMING A SENTENCE BASED UPON AN ERRONEOUS AND UNSUPPORTED FINDING THAT A 30 KILOGRAM COCAINE CONSPIRACY EXISTED THE THIRD CIRCUIT VIOLATED PETITIONERS' DUE PROCESS RIGHTS AND THEIR RIGHTS UNDER THE SENTENCING GUIDELINES.

A. The Trial Judge Failed to Make Necessary Findings Regarding Petitioners' Ability to Consummate a Cocaine Conspiracy of the Magnitude Found by the Trial Judge to Exist and the Findings that the Judge Did Make Were Completely Arbitrary and Unsupported by the Record.

As noted previously, the tape recordings conclusively establish that a cocaine conspiracy did not exist because no agreement had been reached on the price for the drug, the quantity to be purchased, the place for delivery or the time for delivery. Assuming, *arguendo*, that there were grounds for the jury to conclude that a conspiracy existed, notwithstanding the improper evidence before it, and the court's improper instructions to it, the

trial judge had no grounds to conclude that the conspiracy of which petitioners were convicted involved thirty kilograms of cocaine, or that Nicholas Parlavecchio was a leader or manager of the conspiracy.

Under the Federal Sentencing Guidelines, a court is to consider, in imposing sentence, the quantity of controlled substances involved in the conspiracy of which a defendant has been convicted. *United States v. Reyes*, 930 F.2d 310, 315 (3rd Cir. 1991). The current Commentary to Guideline 2D1.4 provides, in pertinent part:

> 1. . . . If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, *where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing*
> . . .
>
> 2. Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. . . .

(emphasis supplied).

The Commentary to the sentencing guidelines in existence at the time of the offense alleged in the indictment, provided:

> 1. . . .Where the defendant was not reasonably capable of producing the negotiated amount the court may depart and impose a sentence lower than the sentence that would otherwise result. if the defendant is convicted of conspiracy, the sentence should be imposed only on the basis of the defendant's conduct or the conduct of co-conspirators in furtherance of the conspiracy that was known to the defendant or was reasonably foreseeable.

When the above commentary was amended on November 1, 1989, the notes explaining the amendment stated in part:

> ***This provision may result in inflated offense levels in uncompleted offenses where a defendant is merely "puffing", even though the court is then authorized to address the situation by a downward departure.*** *The purpose of this amendment is to provide a more direct procedure for calculating the offense level where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount.*

(emphasis supplied).

As the tape recordings surreptitiously made by Campos make abundantly clear, *no* agreement had been reached for the purchase and sale of any particular quantity of cocaine at any particular price. On July 1, 1989, Campos tells Nicholas Parlavecchio, at the direction of agent Guslavage, that he has "about 60 cases of it [cocaine]". Ten days later, on July 11, 1989, Campos tells Nicholas that he got rid of a lot of what he had that he has about 20 or 25 left. On July 20, 1989, Nicholas Parlavecchio says to Campos, "Can it

be like in 2's and 3's, if *anything*? (emphasis supplied). That same day, Nicholas takes Campos "We'll take 10", yet in the same conversation states, "*maybe* a 2 or 3 here *that I could possibly*", "*maybe* 5, *I don't know*". One week later, on July 27, 1989, Nicholas is on the telephone with co-defendant Giovinazzo, to whom he stated: "Your friend was here and he was talking very small. He wasn't talking about anything a he was talking like one." That same day, Campos calls Nicholas and tells him that he is willing to give him 3 kilograms of cocaine, which does not have to be paid for if Nicholas is not satisfied. Nicholas, during that conversation, says various things to Campos, such as: "That is really the potential for 30"; "What three? Thirty"; "one, two, three, four, five you know." After no agreement is reached, Nicholas, through his secretary, the very next day, states that "it's over".

It is remarkable, in light of the foregoing conversations, that the judge could have found the existence of a 30 kilogram cocaine conspiracy and that the Third Circuit could have affirmed that ruling. [Da1889]. In fact, as evidence of just how arbitrary the trial court's finding was, the Probation Officer, in his presentence report, opined that the conspiracy was for between 5 and 15 kilograms of cocaine. And the government, which entered into a plea agreement with defendant Andrew Giovinazzo, the person who would purportedly be buying the cocaine from Nicholas Parlavecchio, stipulated in his plea agreement that the attempt to which Giovinazzo was pleading guilty involved 1 kilogram of cocaine. In finding that a 30 kilogram conspiracy existed with respect to petitioners, the judge relied solely upon the tape recordings made by Campos and failed to consider, as he was required to, whether petitioners were financially capable of engaging in an agreement of that magnitude. In addition, he failed to consider that there was no evidence that Giovinazzo, the purported recipient of the cocaine being brokered by defendant, was seeking 30 kilograms of cocaine.

Because the trial court's sentencing findings were not

supported by reliable evidence, *see, e.g., United States v. Reyes,* 930 F.2d 310, 316 (3rd Cir. 1991), and because there had been no showing made that petitioners had the finances to complete a 30 kilogram transaction, *see, e.g., United States v. Richardson,* 939 F.2d 135 (4th Cir. 1991) they should have been reversed by the Third Circuit. *See also, United States v. Miele,* 989 F.2d 659 (3rd Cir. 1993) (District Court's conclusory finding as to the drug quantity involved for purposes of determining defendant's sentence under the Sentencing Guidelines fails to meet the Guidelines" "sufficient indicia of reliability" standard); *United States v. Torres,* 926 F.2d 321 (1991) defendant responsible only for foreseeable consequences of participation in conspiracy); *United States v. Jacobo,* 934 F.2d 411 (2nd Cir. 1991) (sentence vacated and remanded for trial court to make independent finding on whether defendant intended to produce the negotiated amount of cocaine and was reasonably capable of producing that amount).[5]

The simple fact is that, here, no agreement had been reached for the purchase of *any* amount of cocaine, at any particular price, for delivery to any particular person, at any particular place, at any particular time. Moreover, even if an agreement had ultimately been reached for the amount of drugs found by the trial judge to be at the center of the conspiracy, there was no showing whatsoever that petitioners had the financial means available to them to consummate the alleged transaction, and no such finding had been made by the judge. In light of the foregoing, because the transaction under negotiation never came to fruition, because no amount could reasonably have been determined to be the object of the conspiracy, and because petitioners did not have the financial means to complete a transaction of the magnitude found by the

---

5. *United States v. Johnson,* 943 F.2d 383 (4th Cir. 1991) (sentenced reversed where district court's fact-finding inadequate to determine amount of cocaine involved in offense); *United States v. Foley,* 906 F.2d 1261 (8th Cir. 1990) (sentence reversed where trial court's finding on magnitude of drug conspiracy was clearly erroneous).

court to exist, the Third Circuit should have vacated the judgment of conviction.

IV.

THE JUDGMENT OF CONVICTION MUST BE VACATED BECAUSE THE THIRD CIRCUIT ERRONEOUSLY FAILED TO RECOGNIZE THE EXISTENCE OF THE DOCTRINE OF SENTENCING ENTRAPMENT AND ITS APPLICABILITY TO THIS CASE, WHERE THE DRUG AMOUNTS DISCUSSED WERE INITIATED BY THE GOVERNMENT, SOLELY FOR THE PURPOSE OF EXPOSING PETITIONERS TO A GROSSLY ELEVATED SENTENCE UNDER THE FEDERAL SENTENCING GUIDELINES.

This case demonstrates the horrible opportunity for sentencing manipulation that the Guidelines present to government agents more interested in creating crime than apprehending criminals. These agents, who know the extremely significant effect that the quantity of drugs discussed in a drug conspiracy can have upon the ultimate sentence imposed, have immense power to destroy lives by influencing the content of what is said during conversations being surreptitiously recorded and the timing of arrests.

Both petitioners Nicholas and Antonino Parlavecchio received extraordinary sentences in a case where no money changed hands and no drugs were transferred, but for a 2 gram cocaine sample that came from the government. As has been discussed at length already, no agreement had ever been reached on the quantity of drugs to be supplied, the price to be paid for them, the place of delivery or the time of delivery. Notwithstanding these gross deficiencies in the government's case, petitioner Nicholas Parlavecchio, who is in his 60's, was sentenced to a prison term of *210 months*, and his son, petitioner Antonino Parlavecchio, was

sentenced to a term of *168 months*. These enormous sentences were imposed because the trial judge attached significance to the words spoken on tape, purportedly about drug quantities. These discussions were not only initiated by the government, but the specific and extraordinarily large amounts of drugs discussed also originated with the government. Agent Guslavage admitted on cross-examination, as had informant Campos, that all of the drug amounts mentioned by Campos in his conversations with petitioners were given to him by agent Guslavage.

Guslavage testified:

> Q: *The numbers that were mentioned were numbers that you told him to mention, is that correct?*
>
> A: *Yes.*

[Da 1024] (emphasis supplied).

On the first day that Campos, in his capacity as an informant, spoke with Nicholas Parlavecchio, he told him that he had "60 cases". Less than two weeks later, after Parlavecchio refuses to respond affirmatively, Campos drops the number to 25. On August 18, 1992, after Parlavecchio tells Campos that he is not willing to enter into any drug transaction, Campos tells him that he is holding on to "these 30 things." The numbers used by Campos, at the direction of agent Guslavage, were not the product of happenstance. These numbers, if agreed upon, translate into draconian sentences. A 60 kilogram cocaine conspiracy, without aggravating adjustments, has an offense level of 36, which, for a first-time offender, means a jail term of between 188 and 235 months. By contrast, a 25 kilogram conspiracy is a level 34, which translates into a jail term of 151-188 months. A conspiracy involving between 3.5 kilograms of cocaine and less than 5 kilograms has an offense level of 30, carrying a sentence of between 97 and 121 months. And a one kilogram conspiracy has an offense level of 26, with a corresponding sentence of 63-78

months. Thus, the jail sentence for a 60 kilogram conspiracy is three times the sentence for a one kilogram conspiracy.

Here, Campos acknowledged that in his entire life as a drug dealer, he had sold about 10 kilograms of cocaine, and every sale was for quantities of no more than 1 kilogram. None of these sales were to petitioners. Yet, upon becoming a government informant, the quantities Campos suddenly began dealing in, or at least talking about, were enormously elevated. The elevation in the quantities discussed by Campos came at the specific direction of the government, solely, Petitioners maintain, for the purpose of elevating any potential sentence they could receive, if convicted.

Although petitioners argued to the court, in their response to the presentence report, that the government's conduct constituted sentencing entrapment, [SA1 to SA2], the court summarily refused to accept petitioner's argument. The doctrine of sentencing entrapment has been recognized in other circuits, but not the Third Circuit. In *United States v. Barth*, ___ F. 2d ___, 53 Crim. L. Rep. 1045, 1056, (8th Cir. April 6, 1993), the Eighth Circuit recognized the doctrine. *See also, United States v. Connell*, 960 F.2d 191 (1st Cir. 1992). In discussing the doctrine, the court noted that the principle recognizes the "terrifying capacity for escalation of a defendant's sentence based on the investigating officer's determination of when to make an arrest". *Id.*

This Court should grant certiorari to confirm that the entrapment doctrine is applies to cases governed by the Federal Sentencing Guidelines.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court should grant Petitioners' Petition for issuance of a Writ of Certiorari.

Respectfully submitted,

ALAN L. ZEGAS
Counsel of Record for Petitioners
Attorney for Petitioner
Antonino Parlavecchio

THOMAS R. ASHLEY
Attorney for Petitioner
Nicholas Parlavecchio

Dated: March 7, 1994

APPENDIX A — SUR PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED DECEMBER 7, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-5216

UNITED STATES OF AMERICA,

Appellee

v.

ANTONINO PARLAVECCHIO, a/k/a "Nino,"

Appellant

(D.C. Criminal Action No. 91-00035-02)

No. 92-5226

UNITED STATES OF AMERICA,

Appellee

v.

NICHOLAS PARLAVECCHIO, a/k/a "Nick,"

Appellant

(D.C. Criminal Action No. 91-00035-01)

Appeal from the United States District Court
for the District of New Jersey

SUR PETITION FOR REHEARING

Appendix A

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ William D. Hutchinson
Circuit Judge

DATED: December 7, 1993

APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 92-5226 DATED OCTOBER 18, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-5226

UNITED STATES OF AMERICA,

Appellee

v.

NICHOLAS PARLAVECCHIO, a/k/a "Nick,"

Appellant

Appeal from the United States District Court
for the District of New Jersey

(D.C. Criminal Action No. 91-00035-01)

District Judge: Honorable Garrett E. Brown, Jr.

Argued: October 4, 1993

PRESENT: HUTCHINSON, COWEN and NYGAARD,
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that the court erred:

1. In its refusal to vacate the judgments of conviction on the grounds that the government failed to prove beyond a

reasonable doubt the existence of a conspiracy to distribute cocaine or of an attempt to distribute cocaine;

2. In admitting hearsay tape recordings into evidence and failing to instruct the jury that it could not consider certain statements of a government informant as statements of a co-conspirator;

3. By imposing a sentence based upon an erroneous and unsupported finding that a 30 kilogram cocaine conspiracy existed and that the defendant was a leader or manager of the alleged conspiracy;

4. In failing to vacate the conviction because it was the product of outrageous government conduct;

5. In allowing the prosecutor to vouch for the truth in his summation;

6. In failing to sever the counts of the indictment; and

7. In calculating the value of the money order fraud for purposes of sentencing;

it is

ADJUDGED AND ORDERED that the judgment of the district court entered April 21, 1992 be and is hereby affirmed.

By the Court,

s/ William D. Hutchinson
Circuit Judge

Appendix B

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: OCT 18 1993

APPENDIX C — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 92-5216 DATED OCTOBER 18, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-5216

UNITED STATES OF AMERICA,

Appellee

v.

ANTONINO PARLAVECCHIO, a/k/a "Nino,"

Appellant

Appeal from the United States District Court
for the District of New Jersey

(D.C. Criminal Action No. 91-00035-02)

District Judge: Honorable Garrett E. Brown, Jr.

Argued: October 4, 1993

PRESENT: HUTCHINSON, COWEN and NYGAARD,
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that the court erred:

1. In its refusal to vacate the judgments of conviction on the grounds that the government failed to prove beyond a

reasonable doubt the existence of a conspiracy to distribute cocaine or of an attempt to distribute cocaine;

2. In admitting hearsay tape recordings into evidence and failing to instruct the jury that it could not consider certain statements of a government informant as statements of a co-conspirator;

3. By imposing a sentence based upon an erroneous and unsupported finding that a 30 kilogram cocaine conspiracy existed;

4. In failing to vacate the conviction because it was the product of outrageous government conduct;

5. In allowing the prosecutor to vouch for the truth in his summation;

6. In failing to sever the counts of the indictment; and

7. In calculating the value of the money order fraud for purposes of sentencing; it is

ADJUDGED AND ORDERED that the judgment of the district court entered April 21, 1992 be and is hereby affirmed.

By the Court,

s/ William D. Hutchinson
Circuit Judge

Appendix C

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: OCT 18 1993

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY ENTERED APRIL 21, 1992

UNITED STATES DISTRICT COURT
District of NEW JERSEY

UNITED STATES OF AMERICA

V.

ANTONINO PARLAVECCHIO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: CR. 91-35-02

Alan Zegas, Esq.
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) *1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, & 26* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18:1962(d)	Conspiracy to conduct a racketeering activity	Ct. 1

Appendix D

18:1962(c)	Engaging in racketeering activity	Ct. 2
21:846	Conspiracy to possess a schedule II narcotic drug	Ct. 4
21:846	Attempt to distribute and possess with intent to distribute cocaine	Ct. 5
21:843(b) & 18:2	Use of telephone in furtherance of cocaine conspiracy	Cts. 6, 7, 8
21:841 (a)(1)(b)(1)(c), & 18:2	Possession with intent to distribute cocaine	Ct. 11
18:1029 (b)(2)(c)	Conspiracy to counterfeit credit cards	Ct. 12
18:1029 (a)(1) & (c) & 2	Trafficking in counterfeit credit cards	Cts. 13, 14, 15 16, 17, 18
18:1343 & 2	Conspiracy to defraud	Cts. 19, 20, 21
18:2314 & 2	Wire fraud	Cts. 25, 26

The defendant is sentenced as provided in pages *2* through *5* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) *23 of Indictment*, and is dicharged as to such count(s).

Appendix D

* * *

☒ It is ordered that the defendant shall pay a special assessment of *$950.00*, for count(s) *1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, 26* which shall be due ☒ immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: *147-66-2301*

Defendant's Date of Birth: *May 14, 1964*

Defendant's Mailing Address:
564 Mountain Avenue
Springfield, New Jersey

Defendant's Residence Address:
Union County Jail
15 Elizabethtown Plaza
Elizabeth, New Jersey

Date of Imposition of Sentence:
April 15, 1992

Name & Title of Judicial Officer:
GARRETT E. BROWN, JR., U.S.D.J.

Appendix D

Defendant: *PARLAVECCHIO, ANTONINO*

Case Number: *CR. 91-35-02*

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *168 months. This term consists of terms of 168 months on each of Counts 1, 2, & 4; in terms of 120 months on Count 5; in terms of 48 months on Counts 6, 7, 8, 9, 10; & 60 months on Counts 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, & 26, all to be served concurrently.*

☒ The court makes the following recommendation to the Bureau of Prisons:
That the defendant be incarcerated in an institution as close to his home as possible.

☒ The defendant is remanded to the custody of the United States marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *5 years. This consists of term of 5 years on Cts. 2, 4, & 5; 3 yrs. on Cts. 6, 7, & 8; & 3 yrs. on Cts. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 25, & 26.*

* * *

Appendix D

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): *¶ 76 amount of cocaine agreed to in conspiracy 30 kilograms, not between 5 and 15 kilograms. ¶ 77 2 level enhancement for use of firearm not established by preponderance of the evidence, all as set forth on the record.*

Guideline Range Determined by the Court:

Total Offense Level: *34*

Criminal History Category: *1*

Imprisonment Range: *151* to *188* months

Supervised Release Range: to *5* years

* * *

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

* * *

☒ Full restitution is not ordered for the following reason(s): *Defendant is unable to pay restitution.*

* * *

Appendix D

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): *as stated on the record.*

* * *

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY ENTERED AUGUST 4, 1992

UNITED STATES DISTRICT COURT
District of NEW JERSEY

UNITED STATES OF AMERICA

V.

ANTONINO PARLAVECCHIO

AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: CR. 91-35-02

Alan Zegas, Esq.
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) *1, 2, 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, & 26* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Appendix E

Title & Section	Nature of Offense	Count Number(s)
18:1962(d)	Conspiracy to conduct a racketeering activity	Ct. 1
18:1962(c)	Engaging in racketeering activity	Ct. 2
21:846	Conspiracy to possess a schedule II narcotic drug	Ct. 4
21:846	Attempt to distribute and possess with intent to distribute cocaine	Ct. 5
21:843(b) & 18:2	Use of telephone in furtherance of cocaine conspiracy	Cts. 9 & 10
21:841 (a)(1)(b)(1)(c), & 18:2	Possession with intent to distribute cocaine	Ct. 11
18:1029 (b)(2)(c)	Conspiracy to counterfeit credit cards	Ct. 12
18:1029 (a)(1) & (c) & 2	Trafficking in counterfeit credit cards	Cts. 13, 14, 15 16, 17, 18
18:1343 & 2	Wire fraud	Cts. 19, 20, 21
18:1343 & 2	Wire fraud	Cts. 25, 26

Appendix E

The defendant is sentenced as provided in pages *2* through *5* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) *23 & 24 of Indictment*, and is discharged as to such count(s).

* * *

☒ It is ordered that the defendant shall pay a special assessment of *$950.00*, for count(s) *1, 2, 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, & 26* which shall be due ☒ immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: *147-66-23-1*

Defendant's Date of Birth: *May 14, 1964*

Defendant's Mailing Address:
564 Mountain Avenue
Springfield, New Jersey

Defendant's Residence Address:
Union County Jail
15 Elizabethtown Plaza
Elizabeth, New Jersey

Date of Imposition of Sentence:
April 15, 1992

Appendix E

s/ Garrett E. Brown, Jr.
Signature of Judicial Officer

Name & Title of Judicial Officer:
GARRETT E. BROWN, JR., U.S.D.J.

Date:
7/28/92

Appendix E

Defendant: *PARLAVECCHIO, ANTONINO*

Case Number: *CR. 91-35-02*

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *168 months. This term consists of terms of 168 months on each of Counts 1, 2, & 4; in terms of 120 months on Count 5; in terms of 48 months on Counts 9 & 10; & 60 months on Counts 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, & 26, all to be served concurrently.*

☒ The court makes the following recommendation to the Bureau of Prisons:
That the defendant be incarcerated in an institution as close to his home as possible.

☒ The defendant is remanded to the custody of the United States marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *5 years. This consists of term of 5 years on Cts. 1, 2, 4, & 5; 3 yrs. on Cts. 9 & 10; & 3 yrs. on Cts. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, & 26.*

* * *

Appendix E

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): *¶ 76 amount of cocaine agreed to in conspiracy 30 kilograms, not between 5 and 15 kilograms. ¶ 77 2 level enhancement for use of firearm not established by preponderance of the evidence, all as set forth on the record.*

Guideline Range Determined by the Court:

Total Offense Level: *34*

Criminal History Category: *1*

Imprisonment Range: *151* to *188* months

Supervised Release Range: to *5* years

* * *

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

* * *

☒ Full restitution is not ordered for the following reason(s): *Defendant is unable to pay restitution.*

* * *

Appendix E

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): *as stated on the record.*

* * *

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY ENTERED APRIL 21, 1992

UNITED STATES DISTRICT COURT
District of NEW JERSEY

UNITED STATES OF AMERICA

V.

NICHOLAS PARLAVECCHIO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: CR. 91-35

Thomas Ashley, Esq.
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) *1, 2, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25, & 26* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Appendix F

The defendant is sentenced as provided in pages *2* through *5* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) *twenty-four 24 of Indictment*, and is dicharged as to such count(s).

* * *

☒ It is ordered that the defendant shall pay a special assessment of *$950.00*, for count(s) *1, 2, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25, & 26* which shall be due ☒ immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: *144-20-5400*

Defendant's Date of Birth: *May 9, 1930*

Defendant's Mailing Address:
15 Gregory Place
Springfield, New Jersey

Defendant's Residence Address:
Union County Jail
15 Elizabethtown Plaza
Elizabeth, New Jersey

Date of Imposition of Sentence:
April 15, 1992

Appendix F

Signature of Judicial Officer:
s/GARRETT E. BROWN, JR., U.S.D.J.

Name & Title of Judicial Officer:
GARRETT E. BROWN, JR., U.S.D.J.

Date:
4/15/92

Appendix F

Defendant: *PARLAVECCHIO, NICHOLAS*

Case Number: *CR. 91-35-01*

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *210 months. This term consists of terms of 210 months on each of Counts 1, 2, & 4; a term of 120 months on Count 5; a term of 48 months on Counts 6, 7, & 8; a term of 60 months on Counts 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25, & 26, all to be served concurrently. The total term of imprisonment is 210 months.*

☒ The court makes the following recommendation to the Bureau of Prisons:
That the defendant be incarcerated in an institution as close to his home as possible.

☒ The defendant is remanded to the custody of the United States marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *5 years. This consists of terms of 5 years on Cts. 1, 2, 4, & 5; 3 yrs. on Cts. 6, 7, & 8; & 3 years on Cts. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25, & 26.*

* * *

Appendix F

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): *¶ 76 amount of cocaine agreed to in conspiracy 30 kilograms, not between 5 and 15 kilograms. ¶ 77 2 level enhancement for use of firearm not established by preponderance of the evidence, all as set forth on the record.*

Guideline Range Determined by the Court:

Total Offense Level: *36*

Criminal History Category: *1*

Imprisonment Range: *188* to *235* months

Supervised Release Range: to *5* years

* * *

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

* * *

☒ Full restitution is not ordered for the following reason(s): *Defendant is unable to pay restitution.*

* * *

Appendix F

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): *as stated on the record.*

* * *

APPENDIX G — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY ENTERED JUNE 17, 1992

UNITED STATES DISTRICT COURT
District of NEW JERSEY

UNITED STATES OF AMERICA

V.

NICHOLAS PARLAVECCHIO

AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: CR. 91-35-01

Thomas Ashley, Esq.
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) *1, 2, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 25, & 26* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Appendix G

Title & Section	Nature of Offense	Count Number(s)
18:1962(d)	Conspiracy to conduct a racketeering activity	Ct. 1
18:1962(c)	Engaging in racketeering activity	Ct. 2
21:846	Conspiracy to possess a schedule II narcotic drug	Ct. 4
21:846	Attempt to distribute and possess with intent to distribute cocaine	Ct. 5
21:843(b) & 18:2	Use of telephone in furtherance of cocaine conspiracy	Cts. 6, 7, 8
21:841 (a)(1)(b)(1)(c), & 18:2	Possession with intent to distribute cocaine	Ct. 11
18:1029 (b)(2)(c)	Conspiracy to counterfeit credit cards	Ct. 12
18:1029 (a)(1) & (c) & 2	Trafficking in counterfeit credit cards	Cts. 13, 14, 15 16, 17
18:1343 & 2	Wire fraud	Cts. 19, 20, 21
18:1343 & 2	Wire fraud	Cts. 25, 26

Appendix G

The defendant is sentenced as provided in pages *2* through *5* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) *3, 23, & 24* and is dicharged as to such count(s).

* * *

☒ It is ordered that the defendant shall pay a special assessment of *$950.00*, for count(s) *1, 2, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 25, & 26* which shall be due ☒ immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: *144-20-5400*

Defendant's Date of Birth: *May 9, 1930*

Defendant's Mailing Address:
15 Gregory Place
Springfield, New Jersey

Defendant's Residence Address:
Union County Jail
15 Elizabethtown Plaza
Elizabeth, New Jersey

Date of Imposition of Sentence:
April 15, 1992

Appendix G

Signature of Judicial Officer:
s/ GARRETT E. BROWN, JR., U.S.D.J.

Name & Title of Judicial Officer:
GARRETT E. BROWN, JR., U.S.D.J.

Date:
June 16, 1992

Appendix G

Defendant: *PARLAVECCHIO, NICHOLAS*

Case Number: *CR. 91-35-01*

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *210 months. This term consists of terms of 210 months on Counts 1, 2, & 4; a term of 120 months on Count 5; a term of 48 months on Counts 6, 7, & 8; 60 months on Counts 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 25, & 26, all to be served concurrently. The total term of imprisonment is 210 months.*

☒ The court makes the following recommendation to the Bureau of Prisons:
That the defendant be incarcerated in an institution as close to his home as reasonably possible.

☒ The defendant is remanded to the custody of the United States marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *5 years. This consists of terms of 5 years on Cts. 1, 2, 4, & 5; 3 yrs. on Cts. 6, 7, & 8; & 3 yrs. on Cts. 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 25, & 26.*

* * *

Appendix G

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): *¶ 76 amount of cocaine agreed to in conspiracy 30 kilograms, not between 5 and 15 kilograms. ¶ 77 2 level enhancement for use of firearm not established by preponderance of the evidence, all as set forth on the record.*

Guideline Range Determined by the Court:

Total Offense Level: *36*

Criminal History Category: *1*

Imprisonment Range: *188* to *235* months

Supervised Release Range: to *5* years

* * *

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

* * *

☒ Full restitution is not ordered for the following reason(s): *Defendant is unable to pay restitution.*

* * *

Appendix G

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): *as stated on the record.*

* * *

APPENDIX H — PROVISIONS OF THE UNITED STATES CONSTITUTION CITED

Fifth Amendment

> No person shall be . . . deprived of life, liberty or property, without due process of law.

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.